

ILLINOIS POLLUTION CONTROL BOARD
October 31, 2019

JOHNS MANVILLE,)
)
 Petitioner,)
)
 v.) PCB 14-3
) (Citizens Enforcemet - Land)
 ILLINOIS DEPARTMENT OF)
 TRANSPORTATION,)
)
 Respondent.)

HEARING OFFICER ORDER

The parties have filed a number motions prior to the commencement of the hearing scheduled for November 19, 2019.

On September 13, 2019, the Illinois Department of Transportation (IDOT) filed a Motion *in Limine* to Strike the Opinions of Douglas G. Dorgan, Jr. (Mot. *in Limine*). Also on September 13, 2019, Johns Manville (JM) filed a Motion to Exclude Base Maps and Related Figures and Testimony at Hearing (Mot. to Excl.). On October 4, 2019, the parties filed their respective responses. Also on October 4, 2019, IDOT filed a Motion to Strike Affidavit of Douglas G. Dorgan Jr. in Support of Complainant’s Motion to Exclude Base Maps and Related Figures and Testimony at Hearing (Mot. to Strike). On October 9, 2019, JM filed a Motion for Leave to File a Reply Instanter to IDOT’s Response to Complainant’s Brief Regarding Motion to Exclude Base Maps, Related Figures and Testimony at Hearing. On October 10, 2019, JM filed its response to IDOT’s Motion to Strike Affidavit of Douglas G. Dorgan, Jr. (Resp. Mot. to Strike). On October 15, 2019, IDOT filed its Response to JM’s Motion for Leave to File a Reply Instanter to IDOT’s Response to JM’s Motion to Exclude Base Maps, Related Figures and Testimony at Hearing.

This order summarizes the filings and then provides my ruling on each motion.

ABBREVIATED PROCEDURAL HISTORY

After a five-day hearing in 2016, the Board issued an interim opinion and order finding that IDOT caused and allowed open dumping of asbestos-containing material (ACM). Specifically, the Board found that IDOT caused open dumping of ACM waste along the south side of Greenwood Avenue within Site 6 and adjacent areas along the north edge of Site 3. The Board further found that IDOT allowed open dumping of ACM waste on the portion of Site 3 within Parcel 0393. Johns Manville v. Illinois Dept. of Transportation, PCB 14-3, slip op at 22-23 (Dec. 15, 2016). The Board directed the hearing officer to hold an additional hearing to develop facts necessary to derive the appropriate remedy. The Board narrowed the remedy hearing to the following three issues:

1. The cleanup work performed by JM in the portions of Site 3 and Site 6 where the Board found IDOT responsible for ACM waste present in soil.
2. The amount and reasonableness of JM's costs for this work.
3. The share of JM's costs attributable to IDOT. *Id.*

On August 13, 2019, the parties filed stipulations to issues one and two above but continue to dispute the share of JM's costs attributable to IDOT. It also appears that the parties do not agree on "where the Board found IDOT responsible for ACM waste in the soil". Mot. to Excl. at 3.

IDOT's MOTIONS

IDOT's Motion *In Limine* To Bar Opinion Testimony of Douglas G. Dorgan, Jr.

Summary of IDOT's Motion

IDOT requests an order barring JM's expert witness, Douglas G. Dorgan, from providing certain opinion testimony at hearing regarding cost attribution as set forth in his Expert Report. IDOT argues three reasons to bar Mr. Dorgan's testimony.

The first is the lack of Mr. Dorgan's relevant experience and expertise. Mot. *in Limine* at 4-7. IDOT states that Mr. Dorgan admitted in his deposition that he cannot recall ever having performed a cost attribution like the one that is at issue here. *Id.* at 5-6. Citing Frye¹, IDOT argues that Mr. Dorgan does not "make any reference to his having employed any sort of established method for conducting his work" as case law requires. *Id.* at 7.

Second, Mr. Dorgan cherry-picked facts that supported his cost analysis "while disregarding possibly less helpful facts" and therefore his cost analysis is "flawed and unreliable." *Id.* at 7-8.

Third, Mr. Dorgan is relitigating issues that the Board in its interim order rejected. Mot. *in Limine* at 4-9. IDOT argues that Mr. Dorgan's opinions on costs attributable to IDOT go far beyond its liability as the Board established in its interim order. *Id.* at 9-12. For instance, Mr. Dorgan opines that IDOT is responsible for all costs associated with the relocation of a City of Waukegan's water line and removal of the North Shore Gas line because all or a portion of the water and gas lines run through a portion of Site 3 within Parcel 0393. *Id.* IDOT also alleges that Mr. Dorgan attempts to enlarge IDOT's liability for Site 6. *Id.* at 10

Summary of JM's Response

¹ Frye v. United States, 293 F. 1013, 1014 (D.C. Cir. 1923) (expert must demonstrate methodology accepted within the community of experts)

JM responds that Mr. Dorgan is qualified to provide the expert opinions found in his report. Resp. at 2. JM refutes IDOT's contention that "an expert must have been tasked with the exact same assignment previously". *Id.* JM points to Mr. Dorgan's deposition where Mr. Dorgan testified that he has been tasked with similar assignments but cannot recall if he has ever been tasked with this exact scenario. *Id.* at 3. Mr. Dorgan has, however, had assignments where multiple parties were involved and had to allocate the clean-up costs between the parties. *Id.* at 4.

JM maintains that the Frye test is inapplicable here because Mr. Dorgan's "methodology does not involve scientific studies or tests and is neither new or novel...". *Id.* at 6. JM further argues that "an expert's testimony and opinion is admissible so long as it will assist the Board to determine the facts at issue". *Id.*

JM next contends that Mr. Dorgan's opinions do not re-litigate the Board's liability determination. JM maintains that merely because Mr. Dorgan and IDOT's expert Mr. Gobelman arrive at differing costs, mostly because of their respective approaches, does not mean that they are re-litigating issues already resolved by the Board. *Id.* at 12-13. JM argues that any discrepancy in cost allocation between the two experts are questions for the Board. *Id.*

Discussion and Ruling

In the liability phase of this enforcement proceeding, I observed and listened, as a hearing officer, to hours of testimony from JM's expert Mr. Dorgan. The Board relied on Mr. Dorgan's testimony throughout its interim opinion. Johns Manville v. IDOT, PCB 14-3 (December 15, 2016). I found him qualified then and I find him qualified now. JM concedes that Mr. Dorgan has not participated in the exact same allocation assignment, but argues that Mr. Dorgan has had similar assignments where multiple parties were involved and he had to allocate the clean-up costs between them. A person will be allowed to testify as an expert if his experience and qualifications afford him knowledge that is not common to laypersons, and where his testimony will aid the trier of fact in reaching its decision. Thompson v. Gordon, 221 Ill. 2d 414, 428-29 (Ill. 2006). Mr. Dorgan has the requisite experience and qualifications to testify to the issue of cost allocation and may assist the Board, as he has in the past, in reaching its decision.

IDOT next argues that Mr. Dorgan "cherry-picked" facts that supported his cost analysis "while disregarding possibly less helpful facts" and therefore his cost-analysis is "flawed and unreliable". Whether or not Mr. Dorgan "cherry-picked" evidence favorable to JM is not clear. However, IDOT will be able to challenge Mr. Dorgan's method of cost analysis at hearing through cross-examination if it chooses to do so.

Finally, IDOT argues that Mr. Dorgan is relitigating issues that the Board rejected in its interim order and that his opinions regarding cost attributable to IDOT go far beyond its liability the Board found in its interim order. Whether or not his opinions stray from the narrow issues articulated by the Board for the remedy hearing, that is for the Board to decide.

IDOT's Motion *in Limine* to Strike the Opinions of Douglas G. Dorgan, Jr. is denied. That I find Mr. Dorgan's testimony admissible does not, of course, bind the Board in giving it the weight it deems appropriate. Nor does my ruling here preclude IDOT from objecting to specific issues at hearing.

IDOT's Motion to Strike Affidavit of Douglas G. Dorgan, Jr. in Support of Complainant's Motion to Exclude Base Maps and Related Figures and Testimony

Summary of IDOT's Motion

IDOT requests an order to strike the affidavit of Douglas G. Dorgan, Jr., that JM filed as Exhibit J in support of its motion to "Exclude Base Maps and Related Figures and Testimony at Hearing".² IDOT cites to Illinois Supreme Court Rule 191 (a) in support. Rule 191 (a) requires that the affiant have personal knowledge and that the affidavit shall not consist of conclusions but of facts admissible in evidence. Mot. to Strike at 3.

IDOT first notes that Mr. Dorgan's signature on his 2019 Affidavit is "completely different" than his signature on his 2016 Affidavit. *Id.* at 4. IDOT alleges that the signatures were not written by the same person and therefore not based on Mr. Dorgan's personal knowledge as required by Rule 191 (a). As a result, Mr. Dorgan's 2019 Affidavit must be stricken in its entirety. *Id.* at 4.

Citing caselaw in support, IDOT's next argument is that paragraphs four through seven of Mr. Dorgan's 2019 Affidavit must be stricken because it is "a series of assertions that are unsupported any facts" contrary to what Rule 191 (a) requires. *Id.* at 5. IDOT cites to Cain v. Joe Contarino, Inc. 2014 Il. App. (2d) 130482 (2014), where the court found that the expert ran afoul of Rule 191 (a) where he "cited mostly 'industry customs and practices' ...yet never specified their content." *Id.*

Summary of JM's Response

JM responds that IDOT has accused them of fraud and Mr. Dorgan would unequivocally testify to the validity of the signatures. Resp. Mot. to Strike at 1. JM admits that the signatures being compared may look different, however, this is because the previous document was signed over three years ago. *Id.* at 2. Finally, JM states that in the attachment marked as "Exhibit A" is an email Mr. Dorgan sent to attorneys of JM with the signed affidavit, establishing that Mr. Dorgan had personal knowledge of the matters therein. *Id.*

JM next contends that the paragraphs identified by IDOT in the 2019 Dorgan Affidavit are not conclusory and that IDOT misinterpreted the rule found in Cain. JM claims this is because "unlike the affidavit in Cain, which only referred to 'industry customs and practices' and nothing more, Mr. Dorgan's 2019 Affidavit expressly and factually identifies the industry customs and practices Mr. Gobelman failed to meet in creating the Base Maps." *Id.* at 3. JM claims that is sufficient. *Id.*

² JM filed Mr. Dorgan's 2019 Affidavit as Exhibit A to their Mot. to Excl.

Discussion and Ruling

IDOT does not profess to being a handwriting expert, nor do I. IDOT argues that Mr. Dorgan's signature on his 2016 Affidavit is "completely different" from the signature on his 2019 Affidavit and therefore not based upon his personal knowledge as Supreme Court Rule 191 (a) requires. I note that my signature has also changed over the last three years. Unlike the summary judgment proceedings in Cain, Mr. Dorgan will be available at the hearing so that IDOT may illicit testimony from him verifying his signature on his 2019 Affidavit and the content therein if IDOT so chooses.

IDOT's argument that paragraph's four through seven must be stricken because they are conclusionary also fails. As noted above, Mr. Dorgan will be available at hearing and IDOT may cross-examine him regarding the contents of his 2019 Affidavit if it so chooses. I find that Mr. Dorgan does have personal knowledge of the contents therein and that taken as a whole, Mr. Dorgan could competently testify to the contents and to his expert reports. *See e.g. Allied American Insurance Company v. Adam Mickiewicz*, 124 Ill. App. 3d 705 (1984).

IDOT's Motion to Strike Affidavit of Douglas Dorgan's is denied. My ruling does not preclude IDOT from objecting to specific issues at hearing.

JM's Motion

JM's Motion to Exclude Base Maps and Related Figures and Testimony

Summary of JM's Motion

JM requests an order barring IDOT from introducing any evidence, testimony, or exhibits/figures relating to or premised on "Base Maps." Mot. to Excl. at 1. With the exception of the Nicor Gas Line, JM requests an order barring any related figures found in the Initial Report and Supplemental Report of Steven Gobelman and prepared by Andrews Engineering, Inc. *Id.*

JM then references the Stipulation the parties filed on August 13, 2019, and states that while the parties agree on the 'amount and reasonableness' of the costs JM incurred for removal work, "they do not agree on 'where the Board found IDOT responsible for ACM waste present in soil'" and "the share of JM's cost attributable to IDOT." *Id.* at 3. JM states that what remains in dispute is:

- 1) the exact areas where JM did Removal Work ("Removal Areas"); 2) the areas where IDOT is responsible for ACM waste present in the soil ("IDOT Areas of Liability"); 3) the extent to which the Removal Areas are connected to the disputed IDOT Areas of Liability; and 4) the amount of the costs that should be attributed to IDOT. *Id.*

JM argues that Mr. Gobelman lacks the requisite knowledge, skill, experience, education, and expertise to have created the Base Maps. Mot.to Excl. at 9. JM states that Mr. Gobelman

created the Base Maps because he did not agree with “how Mr. Dorgan defined the IDOT Areas of Liability” and associated attributed costs. *Id.* at 5.

JM states that during the first hearing, Mr. Dorgan, Mr. Gobelman and the Board relied on the reports and maps generated by AECOM which identified areas of liability.³ JM states that these AECOM maps were “ultimately approved” by the United States Environmental Protection Agency (USEPA). *Id.* at 7. Now for the remedial portion of the hearing, Mr. Gobelman, apparently not in agreement with cost attribution of AECOM’ reports and maps, has created a Base Map⁴ to determine the areas of IDOT’s liability. *Mot. to Excl.* at 7.

JM maintains that Mr. Gobelman lacks the relevant experience and expertise to have created the Base Maps. *Mot. to Excl.* at 9-11. JM’s cites to Illinois Rule of Evidence 702 that provides one must rely on expertise of their own to testify as an expert, and, Mr. Gobleman admitted he lacked the expertise to create Base Maps. *Id.* JM states that Mr. Gobleman could not have relied on his own expertise because he is not an expert in AutoCAD, the program used to create Base Maps. *Id.* JM argues that Mr. Gobelman relied on the AutoCAD work of Mr. Nguyen to ensure the Base Map’s accuracy, however Mr. Nguyen denies in his deposition that he played this role, stating he was “not the decision maker” and only made edits to the Base Maps at the direction of Mr. Gobleman. *Id.* at 10. JM requests an order barring the inclusion of these Base Maps and related Figures because Mr. Gobleman, who lacked the expertise in the area, controlled the entire Base Map creation process without any input from Mr. Nguyen, who has experience creating base maps. *Id.*

JM also argues that the Base Maps lack adequate foundation because their creation did not rely on and/or follow the appropriate applicable standards. *Mot. to Excl.* at 11-12. Furthermore, JM maintains the Base Maps were not created using facts or data relied upon by experts in the field. *Id.* JM asserts that Mr. Gobleman did not use AECOM and instead built the boundaries based on an aerial image from Google, resulting in a conflict from AECOM’s Final Site Survey boundaries and that failure to follow appropriate standards led to critical mistakes in creating the Base Maps. *Id.* at 13-14.

JM also argues that key features fail to align with their location as depicted on the AECOM maps. *Id.* at 15. JM claims that established scientific principles and accepted methodologies were not followed in creating the Base Maps because the maps were built using inconsistent sources and because the maps moved fixed features, thus unreliable. *Id.* at 15-17. JM continues its assertions and maintains that the documents Mr. Nguyen used to create the Base Map, including the ELM documents⁵, should not have been used because he did not believe they were reliable. *Id.* at 20.

³ AECOM is JM’s environmental consultant.

⁴ Mr. Gobelman’s Base Map was created with the assistance of Michael Nguyen, a CAD manager. “CAD is a computer aided design and drafting technology which is routinely used to make maps.” *Mot. to Excl.* at 7.

⁵ ELM documents are documents, including maps and figures, generated by ELM Consulting.

Finally, JM argues that the reliance on Mr. Nguyen was unreasonable and unreliable. *Id.* at 19. JM references Mr. Nguyen's deposition, where he admits to not having any say or control as to what was prepared. *Id.* at 20. JM claims that if Mr. Gobelman actually relied on Mr. Nguyen to create the Base Maps, his reliance was unreasonable, especially after having been made aware of all the mistakes in the Base Maps that Mr. Dorgan had identified in the Dorgan Rebuttal Report. *Id.* at 20-21.

Summary of IDOT's Response

IDOT responds to JM's assertions and maintains that Mr. Gobelman is qualified to provide his expert opinions on cost attribution analysis and that his Base Maps are reasonable and reliable based on his vast experience in dealing with remediation projects and economic considerations. Resp. at 12-15. IDOT also argues that there was no USEPA approved maps or figures for the Site and even if there were, they have no bearing on how to assess cost attribution. *Id.* at 15-16.

IDOT argues that Mr. Gobelman's reliance on Mr. Nguyen's CAD work was reasonable. *Id.* at 19-20. IDOT states that Mr. Nguyen has 17 years working for Andrews Engineering as a CAD technician. *Id.* at 19. Therefore, Mr. Nguyen's CAD work at issue here is trustworthy and has the requisite foundation. *Id.* at 20. IDOT also maintains that reliance on the ELM documents was reasonable given that the USEPA relied on them when approving a remediation plan, as well as Mr. Dorgan and the Board in its interim order finding liability. *Id.*

Finally, IDOT argues that if Mr. Gobelman's reliance on Mr. Nguyen was not reasonable, "then Mr. Dorgan's CAD drafter similarly lacks an adequate foundation, as his CAD drafter approached her [Riah Dunton] work similarly to how Mr. Nguyen approached his work for Mr. Gobelman and thus not reasonable. *Id.*

Discussion and Ruling

Applying the same standard and reasoning used in my ruling regarding the testimony of Mr. Dorgan, I find that Mr. Gobelman has the requisite expertise to use Base Maps to determine areas of liability instead of reports and maps generated by AECOM. As IDOT notes, and I have observed, Mr. Gobelman has vast experience in dealing with remediation and economic considerations. I also find that Mr. Gobelman's reliance on Mr. Nguyen's CAD work was reasonable. Finally, Mr. Nguyen's 17 years' experience working for Andrews Engineering as a CAD drafter satisfies any foundation issues.

JM's Motion to Exclude Base Maps and Related Figures and Testimony is denied. That I find Mr. Gobelman's testimony admissible does not, of course, bind the Board in giving it the weight it deems appropriate. Nor does my ruling preclude JM from renewing its objections to specific issues at hearing.

JM' s Motion For Leave to Reply To IDOT's Response to Complainant's Motion to Exclude Base Maps, Related Figures and Testimony at Hearing

On October 9, 2019, JM filed a motion for leave to reply to IDOT's response regarding JM's motion to exclude. On October 15, 2019, IDOT filed a response requesting the hearing officer deny JM's motion.

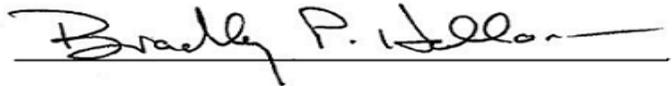
Section 101.500 (e) of the Board's procedural rules states that there is no right to reply except as the Board or the hearing officer permits to prevent material prejudice. After having reviewed JM's motion for leave to reply, I find that no material prejudice would result if the motion was denied.

JM's motion for leave to file a reply is denied.

Motions for Interlocutory Appeal from Hearing Officer Orders

The parties are advised that if they choose to file an interlocutory appeal, it must be filed within 14 days after the party receives the hearing officer's written order. Filing a motion for interlocutory appeal will not postpone a scheduled hearing, stay the effect of the hearing officer's ruling, or otherwise stay the proceeding. *See* Section 101.518 of the Board's procedural rules. *But see* Section 101.514 of the Board's procedural rules addressing motions to stay proceedings.

IT IS SO ORDERED.



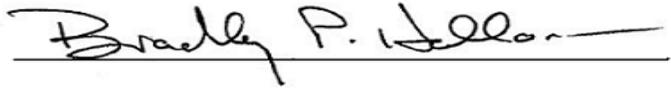
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CERTIFICATE OF SERVICE

It is hereby certified that true copies of the foregoing order were e-mailed on October 31, 2019, to each of the persons on the attached service list.

It is hereby certified that a true copy of the foregoing order was e-mailed to the following on October 31, 2019:

Don Brown
Illinois Pollution Control Board
James R. Thompson Center
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Chicago, Illinois 60601

A handwritten signature in black ink that reads "Bradley P. Halloran" with a horizontal line underneath.

Bradley P. Halloran
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@ Consents to electronic service

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